

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Request for Investigation of FM
Allotment Rule Making Petitions
and Adoption of Policy Regarding
Qualifications to File Multiple
Applications

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Policy and Rules Division
Mass Media Bureau

**OPPOSITION TO PETITION FOR INVESTIGATION
AND ADOPTION OF POLICY STATEMENT**

Victor A. Michael, Jr. opposes the "Petition for Investigation and Adoption of Policy Statement" filed by Saranac Lake Radio ("Saranac"), the licensee of WNBZ(AM) and WSLK(FM), in Saranac Lake, New York. Saranac seeks to suspend a pending rule making filed by Dana Puopolo proposing to allot a new FM channel to Saranac Lake, New York (which, of course, would be a competing signal), while also requesting that the Commission suspend many other proposed allocations. Saranac's request that the channel allocation rule makings be suspended and that the Commission adopt new policies is based solely on speculative, unsupported allegations concerning the *bona fides* of pending rule making petitions filed by Victor A. Michael, Jr.¹ and Dana Puopolo. Saranac's request for investigation and adoption of new policies should be dismissed as speculative and unsupported, as procedurally unsound and unsupported by Commission policy, and as unsupported by the facts.

¹Saranac addresses its objections to Mr. Michael individually, and Vixon Valley Broadcasting, Mountain Tower Broadcasting, Mountain West Broadcasting, Windy Valley Broadcasting, West Wind Broadcasting, and Magic City Media, Inc.

1. Petition is Procedurally Unsound.

Saranac's Petition should be dismissed as an unauthorized pleading. Section 1.415 of the Commission's rules provides that after a notice of proposed rule making is issued, comments may be submitted in support of or in opposition to proposed rules, as in this case of a proposed amendment of the table of allotments. Thus, any comments Saranac makes regarding the petition for rule making relating to Saranac Lake, New York or any other allocation should be made in response to the particular notice of proposed rulemaking.

In the alternative, Saranac could file a general petition for rule making with the Commission requesting a change in the Commission's current rules and policies regarding the processing of petitions for rule making to modify the FM Table of Allotments. A "Petition for Investigation and Adoption of Policy Statement," however, is not an appropriate vehicle either to comment on a petition for rulemaking/notice of proposed rulemaking or to request the Commission to change its rules and policies. Therefore, the Petition should be dismissed.

2. Petition Fails to Provide Evidence of Abuse or Lack of *Bona Fide* Intent.

Saranac makes many bald, unsubstantiated allegations and insinuations that "mass filers" of petitions for rule making to allot new FM channels lack a *bona fide* interest in filing applications for or constructing such channels, and asks the Commission to suspend allotment proceedings involving "mass filers" to investigate their financial and technical capability (Petition, p.10). Saranac's speculation that Mr. Michael filed multiple allotment petitions for the purpose of shopping for financing to participate in auctions (Petition, pp.2-3) is totally unfounded and made with no corroborating evidence. In fact, Saranac fails to allege a single piece of evidence that Victor A. Michael, Jr., lacks the intent or financial capability to construct or operate allotted FM stations. The Commission has ruled that the type of speculative abuse alleged by Saranac is insufficient to deny an application for allotment. *See Morristown, New York*, 5 FCC Rcd. 6976 at ¶4 (Nov. 20, 1990)

("Petitioner has stated and restated its intention to apply for the channel, if allotted, and Wireless has not presented sufficient evidence to find that petitioner's statement is not *bona fide*."); *Tylertown, Mississippi*, 19999 FCC LEXIS 1150, DA 99-531 (March 19, 1999) ("There is nothing in the record of this proceeding or any other proceeding, beyond the speculation of Guaranty Broadcasting, that would suggest that Henderson will not file an application for the Tylertown allotment.")

3. Commission Rules/Policy on Bona Fide Expression of Intent in Allotment Proceedings.

The Commission has repeatedly held that a *bona fide* expression of interest in a petition for rule making for an FM allotment requires the petitioner to state (1) an interest in the channel to be allotted; (2) a present intention to apply for the channel if an allotment is granted; and (3) an intention to construct the station.² The Commission has specifically ruled that a determination of "bona fide" intent is not contingent on its finding of a petitioner's financial ability to construct an allotted station, and that the appropriate time at which to raise the issue of a petitioner's financial ability is at the application stage.³

As Saranac notes (Petition, p. 7), the Commission has already considered the issue of how to deter the filing of non-*bona fide* expressions of interest in applying for allotments in a 1990 Report and Order.⁴ This "Abuse Report and Order" provides that

[A] statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1015 of

²See, e.g., *Shingletown, California*, 11 FCC Rcd. 8672 at ¶3 (July 26, 1996); *Lopez and Dushore, Pennsylvania*, 7 FCC Rcd. 854 at ¶7 (Jan. 28, 1992); *Carmel, Carmel Valley, Hollister and Scotts Valley, California*, 7 FCC Rcd 3056 at ¶11 (May 15, 1992).

³See *Morristown, New York*, *supra*, at ¶4.

⁴*Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990) ("Abuse Report and Order").

the Rules . . . However, we also wish to ensure that a charge of misrepresentation is raised and treated as a serious matter. The mere fact that a party in one proceeding files a pleading in which it states an interest in applying for a station, but subsequently fails to do so, is not sufficient evidence, by itself, of misrepresentation. On the other hand, where there is either direct evidence of misrepresentation, or evidence of a pattern of filings in which a party expresses an interest in an allotment and either voluntarily dismisses its proposal prior to action in the allotment proceeding or fails to file an application, a question may arise as to whether the party is advancing proposals in good faith. Depending on the facts in the case, the Commission may find the intent to deceive necessary for a determination of misrepresentation.

Id at ¶¶29, 30.

Thus, a mechanism already exists for the Commission to curb abuses of the allotment application process. Neither the Abuse Report and Order nor any other Commission rule or policy requires the Commission to scrutinize the financial ability of an allotment petitioner to determine whether its statement of intent to apply for an allotted station is *bona fide*. Rather, the Abuse Report and Order suggests that the Commission *may* investigate a petitioner to determine misrepresentation *where there is direct evidence of misrepresentation, or evidence of a pattern of filings after which the petitioner fails to file an application*.

Despite the Commission's admonition that raising a misrepresentation charge is a serious matter, Saranac does not adduce evidence that Mr. Michael has made material misrepresentations to the Commission under Section 73.1015 or engaged in a pattern of failing to file applications for FM stations after making allotment application for such stations. Saranac acknowledges that "these filings may not contravene any existing rule or policy" (Petition, p.3), but alleges the mere *possibility* of abuse is a sufficient condition for the Commission to suspend processing of rulemaking petitions for allotment and to investigate Mr. Michael for financial fitness and *bona fide* intent (Petition, pp. 2-4, 10-11). As stated above, the Commission has ruled that the type of speculative abuse alleged by Saranac is insufficient to deny an application for allotment.⁵ Furthermore, the Abuse Report and Order that Saranac relies on was issued in response to *actual abuse* of the Commission's processes, where groups and individuals had filed petitions for allotments to exact monetary consideration

⁵See *Morristown, New York, supra* at ¶4; *Tylertown, Mississippi, supra*, at ¶7 ("There is nothing in the record of this proceeding or any other proceeding, beyond the speculation of Guaranty Broadcasting, that would suggest that Henderson will not file an application for the Tylertown allotment.").

rather than for the purpose of operating a broadcast facility.⁶ Here, Saranac is requesting that the Commission make a similar rule or policy change based on the speculative assumption that potential abuse *may* occur. Thus, the Abuse Report and Order is inapposite.⁷ Absent actual evidence of Mr. Michael's lack of *bona fide* intent to operate and construct a new allotted station, Saranac's Petition is meritless.

The Commission has in the past specifically rejected efforts within the channel allocation proceeding to consider other issues beyond technical requirements and a *bona fide* expression of interest in applying for the allotment. As noted by the Commission in *Tylertown, Mississippi*, 1999 FCC LEXIS 1150 at ¶8 (March 19, 1999), in the face of alleged misconduct, "[i]t would not be conducive to the efficient transaction of Commission business to expand the scope of an FM allotment rule making proceeding to other issues...., the allotment rule making proceeding is not the appropriate forum to resolve such an issue. Rather, in regard to the Tylertown allotment, Guaranty Broadcasting will have an opportunity to file a Petition to Deny to TRL Broadcasting Application for this allotment. [citations omitted]."

Similarly, in *Morristown, New York*, 5 FCC Rcd. 6976 (1990), the Commission rejected a "mass filer" argument that challenged the *bona fides* of an applicant's intent to build and operate a station. The opposing petitioner requested that the Commission hold the rule making proceeding in abeyance pending an inquiry into whether the allotment petitioner had a *bona fide* intent, whether he was financially qualified, and whether he violated Commission multiple ownership and translator rules. *Id.* at ¶2. Despite the petitioner's involvement in multiple prior rule makings, in which it did not file for all the allocations requested, the Commission rejected the opposing petitioner's argument. The Commission noted that there is no "Commission rule that requires a petitioner to honor its commitment to file an application for a channel that it has requested," *Id.* at ¶4, and further noted that

⁶Report and Order, at ¶¶ 2, 8, 14 ("The record here confirms that coercive practices, contrary to the purpose and proper use of our process and to the public interest, are occurring. Given this record, modification of our rules to curb abuse is both necessary and justified.").

⁷Also, the Abuse Report and Order did not suspend the Commission's processing of any petitions, as Saranac would have the Commission do in the present proceeding (Petition, p. 11).

it was inappropriate to require petitioner to demonstrate its financial ability, an issue more appropriately raised with an actual application.⁸ *Id.* at ¶4.

Contrary to Saranac's insinuations, the record reveals that Mr. Michael is an experienced operator who has not only in the past filed for allocations, but has filed applications and built and operated numerous stations. Mr. Michael began his career in radio in 1977 as an announcer and, since then, has served as chief engineer of several radio stations, and has been the owner/operator of numerous radio stations. Mr. Michael is or was the owner, or part owner, of numerous companies which owned the following stations: WBNE(FM), Benton, Pennsylvania; WJKR(FM), Muncy, Pennsylvania; WHOE(FM), Avis, Pennsylvania; WCOI/WNKI(FM), Corning, New York; KUUY/KKAZ(FM), Cheyenne, Wyoming; KFBQ(FM), Cheyenne, Wyoming; and KLEN(FM), Cheyenne, Wyoming. He currently has ownership interests in KRKI(AM) and KEZZ(FM), Estes Park, Colorado; and KTRS(FM)/KMLD(FM)/KYOD(FM), Casper, Wyoming. Mr. Michael has over the years been involved in many allotment proceedings. At no time was there ever a finding that any petition he filed was anything other than *bona fide*. On the contrary, Mr. Michael has a proven track record. For instance, in the past several years Mr. Michael formed Michael Radio Group, which petitioned to allot and then filed for applications in the following communities: Channel 271A, Driggs, Idaho (File No. BPH-970807M3); Channel 282A, Victor, Idaho (File No. BPH-970815MF); Channel 249A, Franklin, Idaho (File No. BPH-970814MN); Channel 240A, Weston, Idaho (File No. BPH-970904MD); Channel 284A, Hope, North Dakota (File No. BPH-970925NC); Channel 252A, Glenrock, Wyoming (File No. BPH-971010MG); Channel 261C1, Glendo, Wyoming, station KUUY(FM) (near completion); Channel 298C, Midwest, Wyoming, station KRVK(FM) (recently sold); Channel 298A, Superior, Montana station KREO (construction permit); Channel 272A, Randolph, Utah, station KAIO (construction permit assignment application pending); and Channel 261A, Forest City, Pennsylvania (settlement agreement recently filed).

⁸In its effort to suspend the rule making proceeding, Saranac argues that the "substantial" up-front auction payments further justify special financial consideration. First, there are no definitive up-front auction payment requirements. In the Commission's recent May 17, 1999 Public Notice, DA 99-940, the Commission sought comment on reserve prices, minimum opening bids, and other auction procedural issues. Although the Notice proposes up-front payments, it seeks comment on whether up-front payments should even be required and seeks comments on minimum bids and other issues. Furthermore, the Commission is proposing only minimum opening bids, which allows the auctioneer the discretion to lower the minimum bid later in the auction. Comment is sought on whether there should be no minimum opening bid at all. In sum, at this point there are no definitive payment requirements, as Saranac alleges.

Mr. Michael, along with his brother Van Michael, have developed and constructed many new radio stations, not only for themselves, but for other operators as well. The Michael brothers have the expertise to construct stations from the ground up. Because of this, they can construct stations very cost effectively. This, coupled with new operating efficiencies, such as computerization and automated programming, make it possible to provide new FM service to communities that may not have been able to support a station until recently. Not only does Mr. Michael have the requisite past experience and history to support his *bona fide* intent to apply for and construct proposed allocations, but he currently owns assets valued at over many million dollars. This, along with his association with other business associates and other financial institutions, provides a very significant source of funding.

The other Commission policy changes that Saranac cites in support of its Petition (p. 8), in addition to the Abuse Report and Order, are inapposite. First, Saranac relies on the Commission's Report and Order, *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders* ("Automatic Stays Report and Order").⁹ Prior to this Report and Order, the Commission's rule granted an automatic stay of any Commission order modifying an authorization to specify operation on a different FM or TV channel whenever a party filed a petition for reconsideration of the order.¹⁰ The Commission found that these petitions for reconsideration resulted in unjustifiable expense and delay, and "that the many apparently meritless petitions for reconsideration the rule appears to have encouraged have imposed a substantial and unwarranted cost on local communities, individual broadcasters, and the Commission itself."¹¹ Thus, the Commission acted in response to *actual conflict and injury* resulting from its automatic stay rule. In contrast, no actual conflict or injury exists in the present case--only potential harm premised on the alleged bad faith of a petitioner for an FM allotment that Saranac speculatively asserts to exist, without providing any evidence. No such bad faith was assumed in the Automatic Stays Report and Order. Furthermore, that Report and Order acted to *protect* applications for FM allotments, not to *deter*

⁹11 FCC Rcd. 9501 (1996).

¹⁰11 FCC Rcd. 9501 at ¶1.

¹¹11 FCC Rcd. 9501, at ¶¶5, 6, 9.

them as Saranac would have the Commission do in the present case. Thus, this Report and Order is inapposite.

Second, Saranac relies on the Commission's Report and Order, *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments* ("Rulemaking Report and Order").¹² The Commission acted in this Report and Order to resolve *actual conflicts* between (1) rulemaking petitions to amend the FM Table of Allotments; and (2) applications for new FM stations or for changes in facilities. The Commission recognized that the FM applicant was often required to suspend prosecuting its application until the rulemaking proceeding was resolved, and to amend its application to specify a nonconflicting site.¹³ As Saranac pointed out, the Commission "recognized that its Rules duplicated work, fostered delay and increased expense" (Petition, p.8). In contrast, no actual conflict or injury exists in the present case--only potential injury that may be caused by a non-*bona fide* intent that Saranac alleges without any supporting evidence. No such bad faith was assumed in the Rulemaking Report and Order. Thus, this Report and Order is inapposite.

Finally, as a policy matter, requiring the Commission to investigate the financial fitness and *bona fide* intent of each petitioner for an FM allotment that files over five such petitions, even if no actual abuse by such petitioners were evident or alleged, would create a great administrative burden, both on the Commission (absorbing valuable staff resources) and on the petitioners (requiring provision of detailed financial information to Commission, delaying petitions for new FM allotments, and generally deterring applications). Not only has the Commission refused to involve itself in financial qualifications issues at the rule making stage, it no longer even concerns itself with financial qualifications at the application stage. In the *Commission's Implementation of §309(j) of the Communications Act / Competitive Bidding for Commercial Broadcast Stations, First Report and Order*, FCC 98-194 (released August 19, 1998), the Commission eliminated the financial certification requirement from the long Form 301 applications. The Commission noted, "and adjudicating issues relating to whether the winning bidder had reasonable assurance of site availability

¹²⁷ FCC Rcd. 4917 (1992).

¹³⁷ FCC Rcd. 4917, at ¶¶1-3, 8 ("[T]his unlimited exposure to potentially conflicting petitions and the concomitant delay it causes to applicants is both inequitable and inconsistent with our treatment of mutually exclusive proposals in both the allotment and application contexts.").

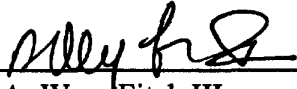
or was financially qualified would waste the resources of the Commission and of the parties and would serve only to delay service to the public." *Id* at ¶ 99.

Conclusion.

Saranac's Petition for Investigation and Adoption of Policy Statement should be denied. It offers no more than speculation and unfounded conjecture to support its claims that Victor A. Michael, Jr. lacks the requisite *bona fide* intent to file for and construct stations in the communities proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Millie Adams, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 25th day of May 1999, by first-class, postage prepaid, U.S. Mail, copies of the foregoing OPPOSITION TO PETITION FOR INVESTIGATION AND ADOPTION OF POLICY STATEMENT to the following:

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